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Anti-Vibrator Legislation: The Law is on Shaky Ground

by NICOLE SCHILDER*

*"I think this is an uncommonly silly law."*¹

I. Introduction

Are women getting the shaft when it comes to the constitutional right of privacy? According to a handful of state legislatures and the Eleventh Circuit, states can criminalize the sale of sexual devices,² based primarily on the idea that the privacy right does not extend to that arena. Alabama, Georgia, Mississippi, Texas, and Virginia currently have such statutes.³ Similar statutes were struck down by the Colorado Supreme Court in 1985,⁴ the Kansas Supreme Court in

* J.D. candidate, May 2002, University of California, Hastings College of the Law. My heartfelt thanks go to Eric Anderson, Cynthia Aukerman, Jamie Nye, and Stephen Tollafeld for their penetrating insights and instrumental research assistance. Thanks also to my family and friends, who have been persistently supportive (and often entertaining) in the face of a rather unconventional subject. Finally, special thanks to Professor Margaret Russell for her assistance in bringing this Note to its final fruition.

1. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

2. For the purposes of this article, "sexual devices" refers to items intended to stimulate human genital organs, including but not limited to vibrators, dildos, artificial vaginas, and anal beads.

3. ALA. CODE § 13A-12-200.2 (Supp. 2000); GA. CODE ANN. § 16-12-80(a) (2000); MISS. CODE ANN. § 97-29-105 (2000); TEX. PENAL CODE ANN. § 43.23 (Vernon 2000); VA. CODE ANN. § 18.2-372 (Michie 2000). Such statutes will occasionally be referred to as "anti-sexual device" statutes in this article. There are no cases discussing constitutional challenges to the Virginia and Mississippi anti-sexual device statutes. The Virginia statute makes it illegal to "sell . . . any obscene item." VA. CODE ANN. § 18.2-374(3). "Obscene" is defined as something that, "considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex." *Id.* at § 18.2-372. It is possible that, given the definition of obscenity, Virginia courts would not have a problem with individuals buying sexual devices for therapeutic use. Mississippi's obscenity statute makes it a crime to "knowingly sell[.] . . . any three-dimensional device designed or marketed as useful primarily for the stimulation of human genital organs." MISS. CODE ANN. § 97-29-105.

4. *People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 370 (Colo.

1990,⁵ and by a Louisiana court of appeals in 1999.⁶ The existing statutes prohibit the sale of what the legislatures have chosen to term "obscene devices," which are almost uniformly described as instruments designed or marketed as useful primarily for the stimulation of human genital organs. This Note addresses whether such statutes should be struck down as unconstitutional.

This Note begins with a history of sexual devices in the United States. Some people feel that the subject of sexual devices is offensive, crude, or titillating. Depending on a person's perspective, it can be any of these things, or none of them. Regardless of what an individual thinks of sexual devices generally, the legal question at issue in this Note is important. It may be helpful for the reader to understand the history and use of such items, particularly in the United States, before launching into a legal analysis of anti-sexual device statutes. The history of sexual devices is used to demonstrate that these aids, in particular dildo-type vibrators, have been used for a variety of reasons and approved of for centuries.

The primary argument is that anti-sexual device statutes are unconstitutional because they infringe on the privacy right.⁷ The question addressed under this argument is whether the decision to buy and use sexual devices falls within the penumbra of protections granted by the privacy right as articulated by the Supreme Court. As discussed later in this Note, decisions about intimate relationships have been acknowledged for decades as falling under the privacy right, and they can be destroyed by sexual dysfunction. States are invading an area in which individuals should be able to make their own decisions, particularly about matters that fundamentally affect their lives, by making treatment more difficult to obtain. This section includes a discussion of a possible expansion of the privacy right and why application of the strict scrutiny test is appropriate. The discussion concludes that anti-sexual device statutes should be struck down using the strict scrutiny test. However, even if they are not, the next section concludes that such statutes should fail under the rational

1985).

5. *State v. Hughes*, 792 P.2d 1023, 1032 (Kan. 1990).

6. *State v. Brennan*, 739 So. 2d 368 (La. Ct. App. 1999).

7. I have chosen not to analyze these statutes under the *Miller* obscenity test because I feel that the privacy issue is of greater import. Also, as one scholar noted, sexual devices should not be considered obscene at all under the *Miller* test. See Maggie Ilene Kaminer, *How Broad is the Fundamental Right to Privacy and Personal Autonomy? – On What Grounds Should the Ban on the Sale of Sexually Stimulating Devices be Considered Unconstitutional?*, 9 AM. U. J. GENDER SOC. POL'Y & L. 395, 410 (2001).

basis test.

The second argument is that anti-sexual device statutes fail to pass the rational basis test due to overbreadth. The problem with such statutes is that, although they do not ban the use of sexual devices outright, they are very broad in their proscriptions, and make sexual devices quite difficult to obtain. State legislatures claim that anti-sexual device statutes protect children and nonconsenting adults from exposure to obscene matter. Yet the statutes go far beyond what is needed to prevent that type of exposure. States could achieve such protective goals by regulating how sexual devices are displayed or requiring licensing of vendors, as opposed to banning sales entirely.

This Note uses as a sample case the most recent challenge to anti-sexual device statutes, *Williams v. Pryor*,⁸ an Eleventh Circuit case from Alabama. It also discusses cases from several states with anti-sexual device statutes, including their similarities to *Williams* and the factors that distinguish them from *Williams*. These cases, analyzed within their relevant sections, illustrate the concept that anti-sexual device statutes should be struck down under both strict scrutiny and rational basis theories.

II. History and Use of Sexual Devices in the United States

A. History

Sexual devices have been used and accepted for centuries. Therapeutic uses in particular have been widely accepted. As early as 1653 physicians were using genital massage as a treatment for women with “hysteria.”⁹ The massage techniques illustrated at that time have changed little over the centuries.¹⁰ The development of electricity simply made it easier for those practicing genital massage, as electric devices allow for continuous stimulation without fatigue and they require less skill on the part of the person performing the massage.¹¹

At the end of the nineteenth century, the forerunner of today’s

8. 240 F.3d 944 (11th Cir. 2001).

9. RACHEL P. MAINES, *THE TECHNOLOGY OF ORGASM: “HYSTERIA,” THE VIBRATOR, AND WOMEN’S SEXUAL SATISFACTION* 1 (1999). “Hysteria,” which literally means womb disease, consisted of a wide variety of symptoms in women, including “fainting, . . . nervousness, insomnia, . . . muscle spasms, . . . [and] loss of appetite for food or for sex.” *Id.* at 1, 23.

10. *Id.* at 12.

11. *Id.* at 11.

vibrator¹² was invented by a doctor in England as a “palliative for female complaints.”¹³ Physicians of that era were pleased with the dramatic decrease in treatment time for hysteria patients (from one hour pre-vibrator to ten minutes post-vibrator) because they could service more patients.¹⁴ It was a convenient way to improve clinical productivity and increase the amount of money doctors could bring in by treating more patients.¹⁵ At that time, and indeed until 1952 when the American Psychiatric Association changed the medical paradigm, hysteria was “one of the most frequently diagnosed diseases in history.”¹⁶ Doctors had many patients requiring treatment for hysteria.¹⁷ Furthermore, doctors did not want to be the ones performing genital massage on women, not because it was immoral, but because they thought it was “a routine chore,” and were thus grateful to have instruments available to perform the task.¹⁸

Vibrating genital massagers were popular until the 1920s,¹⁹ after which they fell out of favor among many in the United States. However, vibrators have continued to be offered for sale, mostly without proscription or other regulation, and they have been used for sexual therapy on a regular basis. In addition, women and men buy sexual devices for everyday intimate activities and personal pleasure.

B. Therapeutic Uses

Notably, the Food and Drug Administration established regulations regarding both “powered vaginal muscle stimulators”²⁰ and “genital vibrators”²¹ in their therapeutic forms in 1980.²² Vaginal muscle stimulators are devices that are intended for “therapeutic use in increasing muscular tone and strength in the treatment of sexual

12. For the purposes of this article, a vibrator is a device used to stimulate human genital organs, which may or may not be shaped like a phallus, and which runs on battery or electrical power.

13. MAINES, *supra* note 9, at 11.

14. *Id.* at 4.

15. *Id.* at 11.

16. *Id.*

17. *Id.*

18. *Id.* at 4.

19. MAINES, *supra* note 9, at 20. In fact, vibrating massagers were advertised in many magazines and catalogs, including Sears, Roebuck, through the 1920s and beyond. *Id.* at 105.

20. 21 C.F.R. § 884.5940 (2001).

21. *Id.* § 884.5960.

22. *Williams v. Pryor*, 41 F. Supp. 2d 1257, 1284 n.33 (N.D. Ala. 1999).

dysfunction.”²³ Similarly, genital vibrators are “electrically operated device[s]... for therapeutic use in the treatment of sexual dysfunction or as an adjunct to Kegel’s exercise (tightening of the muscles of the pelvic floor to increase muscle tone).”²⁴

Many therapists today like their patients to use vibrators because women with “very high orgasmic thresholds,” who would otherwise not be able to have orgasms at all, usually respond to vibrators at some point.²⁵ These women are often diagnosed as “anorgasmic.”²⁶ Anorgasmia, the inability to have an orgasm, is a “recognized and treatable medical condition.”²⁷ If not treated, it can have deleterious effects on women’s health, both physically and psychologically.²⁸ Perhaps the most important argument this Note addresses is the fact that anorgasmia can “destroy a marriage or relationship.”²⁹ The standard treatment for this medical condition is the use of vibrators and other such sexual devices.³⁰

As stipulated by the parties in *Williams v. Pryor*, vibrators can help anorgasmic women in several ways.³¹ For those who are not as responsive physiologically, vibrators help lower the threshold at which orgasm is produced.³² Second, when used in conjunction with Kegel’s exercise,³³ they help tighten relaxed pelvic muscles, which can help women who are incontinent, and can also return orgasmic responses to a woman’s normal level.³⁴ Finally, in women who have orgasmic inhibition,³⁵ vibrators can help lower inhibitions so that more intense stimulation is presented.³⁶

23. 21 C.F.R. § 884.5940.

24. *Id.* at § 884.5960.

25. MAINES, *supra* note 9, at 122. The end users of sexual devices who brought suit against Alabama included women who use vibrators and other sexual devices as therapeutic implements. *Williams*, 41 F. Supp. 2d at 1267.

26. *Williams*, 41 F. Supp. 2d at 1265.

27. *Id.* at 1265-66.

28. *Id.* at 1266.

29. *Id.*

30. *Id.* at 1265.

31. *Id.* at 1265-66.

32. *Williams*, 41 F. Supp. 2d at 1266.

33. A vaginal muscle exercise that is “universally acknowledged as the most effective way of avoiding urinary stress incontinence, short of surgery.” *Id.*

34. *Id.*

35. This condition is caused by having a history of sexual experiences that are nonorgasmic. *Id.*

36. *Id.*

This brings us to the most recent case, *Williams v. Pryor*,³⁷ in which the Eleventh Circuit evaluated the constitutionality of anti-sexual device statutes.

C. *Williams v. Pryor*

In 1998, the Alabama state legislature amended its obscenity statute to include a ban on the sale or production of "any device designed or marketed as useful primarily for the stimulation of human genital organs."³⁸ Anyone found guilty of violating the statute can be charged with a misdemeanor, fined up to \$10,000, and imprisoned for up to one year.³⁹ Further convictions may result in the accused being charged with a felony. The legislature stated as its primary reason for the statute that it would protect children and unconsenting adults from being exposed to "'open displays' of 'obscene material.'"⁴⁰ When it enacted this statute, the Alabama legislature made it far more difficult for its citizens to obtain sexual devices, regardless of the manner in which they are to be used.⁴¹

Shortly after the statute went into effect, several women, representing both vendors and end users of sexual devices, brought suit against the state in federal court, seeking a permanent injunction against enforcement of the statute, claiming the amendment was unconstitutional.⁴² The plaintiffs claimed that if the attorney general enforced the statute, it would "impose an undue burden on their 'fundamental rights of privacy and personal autonomy guaranteed by . . . the constitution;'"⁴³ thus, they argued that "their right of privacy and personal autonomy constitute[d] a 'liberty interest' protected by the Due Process Clause of the Fourteenth Amendment."⁴⁴ The plaintiffs wanted the court to recognize an expansion of the right to privacy in order to include the use of sexual devices when engaged in private and lawful sexual activity.⁴⁵ The

37. 240 F.3d 944 (11th Cir. 2001).

38. ALA. CODE § 13A-12-200.2(a)(1).

39. *Id.*

40. *Williams*, 41 F. Supp. 2d at 1288.

41. As will be discussed later in this Note, some sex therapy experts believe that if statutes such as these are allowed to stand, "anorgasmic women [will] be 'substantially impacted,'" as the unavailability of dildo-type vibrators "would put a very serious block in the way of effective treatment." *Hughes*, 792 P.2d at 1025.

42. *Williams*, 41 F. Supp. 2d at 1257.

43. *Id.* at 1274.

44. *Id.*

45. *Id.* at 1275.

district court framed the question as whether the right to use sexual devices was fundamental under the constitutional right to privacy.⁴⁶ The court agreed with the plaintiffs that the proper way to strike down the legislation would be to expand the right to privacy by including a person's freedom to use sexual devices.⁴⁷ Unfortunately, it did not find that to be a suitable option. Instead, the lower court decided that it would not be appropriate to recognize an extension of the constitutional privacy right to include the right to use sexual devices,⁴⁸ and made a strong argument against such expansion.⁴⁹

However, the district court granted the permanent injunction on enforcement of the statute.⁵⁰ The court based its decision on a rational basis analysis, holding that the statute was "an exaggerated response to the State's concerns, and an overly broad means of regulating or prohibiting commerce of obscenity,"⁵¹ and therefore bore no "reasonable, rational relation to a legitimate state interest."⁵²

On appeal, however, a three-judge panel of the Eleventh Circuit reversed the district court's decision and remanded for further proceedings.⁵³ The panel based the reversal on the appellate court's conclusion that the statute was facially constitutional because the state had a legitimate interest in protecting public morality and that this interest was rationally served by the statute.⁵⁴ On the other hand, the appellate court stated that the lower court had not spent enough time analyzing whether the right at issue was fundamental. It decided that the district court had merely considered "whether the 'use of sexual devices' is a deeply rooted and central liberty."⁵⁵ On remand, the panel directed the district court to consider the challenges brought by end users of sexual devices; specifically, to determine "whether our nation has a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried [heterosexual] persons [and] whether contemporary

46. *Id.*

47. *Id.*

48. *Williams*, 41 F. Supp. 2d at 1275.

49. *Id.*

50. *Id.* at 1293.

51. *Id.*

52. *Id.*

53. *Williams*, 240 F.3d at 956.

54. *Id.* at 949.

55. *Id.* at 955.

practice bolsters or undermines any such history.”⁵⁶

III. Expansion of the Fundamental Privacy Right

This section attempts to answer the question whether the use of sexual devices falls under the penumbra of protections granted by the privacy right. If a court finds that there is a fundamental right to use sexual devices in the privacy of one's home, then it must apply the strict scrutiny standard to determine whether the statute is constitutional.⁵⁷ In order to be upheld as constitutional under strict scrutiny, a statute must be “tailored to serve a compelling state interest.”⁵⁸ It must also be “the most narrowly drawn means of achieving that end.”⁵⁹ Statutes analyzed under strict scrutiny are almost always found to be constitutionally infirm.⁶⁰ In fact, some scholars believe that the United States Supreme Court declares certain rights to be fundamental in order to use the strict scrutiny test to strike down statutes, particularly in cases where the Justices suspect legislation is an attempt to enforce a certain type of morality.⁶¹

The first time the Supreme Court declared that the right to privacy in marital relationships had constitutional protection was in *Griswold v. Connecticut*, a case involving state regulation of the use of contraceptives by married couples.⁶² At that time, Connecticut law made it a crime to use contraceptives or to aid and abet anyone in using contraceptives, regardless of marital status.⁶³ The Court chose to hear the case because it directly involved “an intimate relation of husband and wife”⁶⁴ Justice Douglas, writing for the majority, “drew on existing case law to help establish support for the idea of constitutional protection for a privacy right not enumerated in the Constitution.”⁶⁵ His discussion of earlier cases included the idea of “penumbras” surrounding guarantees in the Bill of Rights, “formed

56. *Id.* at 955-56. The court was referring to application of the *Glucksberg* test discussed *infra* Section III.A.1.

57. *See* *Roe v. Wade*, 410 U.S. 113, 155 (1973).

58. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

59. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986).

60. D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 98 (1993).

61. *Id.*

62. 381 U.S. 479, 480 (1965).

63. *Id.*

64. *Id.* at 482.

65. PATRICIA BOLING, *PRIVACY AND THE POLITICS OF INTIMATE LIFE* 86 (1996).

by emanations from those guarantees that help give them life and substance.”⁶⁶ The concept of penumbras became a way for the Court to provide constitutional protection for rights that were not enumerated by the Framers.

Only eight years later, in *Eisenstadt v. Baird*, the Supreme Court shifted from *Griswold*’s rationale of protecting the marital relationship, and expanded the privacy right to all individuals for decisions that involved their bodies.⁶⁷ *Eisenstadt* extended the right granted to married people in *Griswold* to unmarried individuals.⁶⁸ William Baird was convicted under a Massachusetts statute that made it illegal in most situations to provide individuals with contraceptives.⁶⁹ Using the Equal Protection Clause, the Court held that the statute did not survive even the minimal rational basis test.⁷⁰ The Court stated that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters . . . fundamentally affecting a person”⁷¹ Though this particular holding dealt with the choice of whether to conceive a child, rather than sexual privacy generally, the shift seemed to signal an expansion of the penumbra of privacy rights, and it particularly included unmarried individuals under its protection.

Eisenstadt and two of its sister cases, *Carey v. Population Services International*,⁷² and *Roe v. Wade*,⁷³ protect privacy because the Court recognized “respect for decisions that fundamentally affect a person’s life.”⁷⁴ The decision whether to use sexual devices can also fundamentally affect an individual’s life by potentially saving intimate relationships that might otherwise be destroyed by sexual dysfunction.

Two decades after *Griswold*, the Court was presented with another privacy issue. In *Bowers v. Hardwick*, Michael Hardwick, a

66. *Griswold*, 381 U.S. at 484. Justice Douglas included the First, Third, Fourth, Fifth, and Ninth Amendments in his discussion. *Id.* at 484-85.

67. 405 U.S. 438 (1972).

68. *Id.* at 453.

69. *Id.* at 440. Specifically, the statute banned the distribution of contraceptives except in the following circumstances: to married individuals for pregnancy prevention, and to married or unmarried individuals for disease prevention. *Id.* at 441.

70. *Id.* at 447 n.7.

71. *Id.* at 453 (emphasis in original).

72. 431 U.S. 678 (1977).

73. 410 U.S. 113 (1973).

74. BOLING, *supra* note 65, at 87.

homosexual man, was charged with committing sodomy in his home.⁷⁵ Hardwick brought suit challenging the constitutionality of Georgia's criminal sodomy statute.⁷⁶ The Eleventh Circuit held that the statute was a violation of the privacy right, and remanded it for review under the strict scrutiny test.⁷⁷ In the meantime, the United States Supreme Court granted certiorari to resolve a conflict between the circuits and reversed the Eleventh Circuit's decision.⁷⁸ The Court, focusing its attention on the "ancient roots" of the proscription, held that homosexuals had no fundamental right to engage in sodomy.⁷⁹

Justice Blackmun wrote a powerful dissent, in which he stated his belief that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."⁸⁰ Justice Blackmun also noted that "[o]nly the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality,'" and that "there [are] many 'right' ways of conducting those relationships."⁸¹

The strict scrutiny test was applied in most of the aforementioned cases. That test consists of three basic questions: (1) Is there a fundamental right?; (2) Is the fundamental right being infringed?; and (3) Does the government have a compelling interest in regulating the activity, by means that are narrowly tailored to meet that interest (ends/means test)? The Supreme Court used this test in *Griswold* when it struck down a statute criminalizing the use of contraceptives.⁸² As noted in the *Glucksberg* analysis below, the right to buy and sell sexual devices should fall under the fundamental privacy right, thus making statutes banning such sales an infringement upon that fundamental right. Finally, because states could use less restrictive measures to meet their goal of keeping minors and unconsenting adults from being exposed to displays of sexual devices, anti-sexual device statutes fail the ends/means test, making them

75. 478 U.S. 186, 187-88 (1986).

76. *Id.* at 188.

77. *Id.* at 189.

78. *Id.*

79. *Id.* at 192. *Williams* is distinguishable from *Bowers*, since, as will be noted later, there is no longstanding tradition of criminalizing the sale of sexual devices.

80. *Id.* at 208 (Blackmun, J., dissenting).

81. *Id.* at 205 (Blackmun, J., dissenting).

82. 381 U.S. at 485.

unconstitutional.

A. Is the Right to Buy and Sell Sexual Devices Fundamental and Is That Right Infringed By Anti-Sexual Device Statutes?

The Due Process Clause is a guarantee of more than just fair process. It also “provides heightened protection against government interference with certain fundamental rights and liberty interests.”⁸³ For a right to be fundamental, it must be “‘objectively, deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”⁸⁴ While the Court is reluctant to expand substantive due process rights,⁸⁵ the Due Process Clause of the Fourteenth Amendment “forbids the government [from] infring[ing] . . . ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”⁸⁶ Courts use strict scrutiny, the least deferential standard of review, to analyze statutes that may violate a fundamental right.⁸⁷

In general, when dealing with substantive due process issues, courts look to the morality of the community as a guide, rather than acting as a check on morality the way they do in Equal Protection cases.⁸⁸ Courts look to many sources when determining due process content, including “the traditions and conscience of our people,”⁸⁹ “this Nation’s history and tradition,”⁹⁰ and “the rights essential to the orderly pursuit of happiness by free persons.”⁹¹ It would seem that, with the community’s morality being the key factor in substantive due process issues, legislatures would be better positioned to interpret

83. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). “Liberty interests” are not limited to “exemption from physical restraint.” Statutes enacted by legislatures can be struck down by the courts when they are “oppressive and arbitrary.” *Welch*, *supra* note 60, at 98.

84. *Williams*, 240 F.3d at 955 (citing *Glucksberg*, 521 U.S. at 720-21).

85. *Glucksberg*, 521 U.S. at 720.

86. *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). The courts tend to get around the fact that an unenumerated right is involved by labeling the liberty interest invoked a fundamental right, thereby allowing them to strike down the legislation by reviewing it under strict scrutiny. *Welch*, *supra* note 60, at 98.

87. *Welch*, *supra* note 60, at 73. Strict scrutiny is also used in cases “when legislative action impinges upon suspect classes,” such as race, alienage, and national origin. *Id.*

88. *Id.* at 96.

89. *Snyder v. Mass.*, 291 U.S. 97, 105 (1934).

90. *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977).

91. *Welch*, *supra* note 60, at 96.

that morality as legislation.⁹² According to some scholars, however, there are many judges and Justices who “believe that the Due Process Clause *does* impose an obligation on the Court to decide whether the legislature got it right on community morality.”⁹³ The Court, by adding unenumerated rights, has chosen in many cases basically to say that the enforcement of the morality of the community is not a legitimate end because it “does not provide a sufficient, legitimate reason for restricting liberty.”⁹⁴ That should be the holding of cases dealing with anti-sexual device statutes.

The most relevant test⁹⁵ to determine whether there is a fundamental right to privacy that covers the buying and selling of sexual devices is articulated by the Supreme Court in *Washington v. Glucksberg*.⁹⁶

1. *Glucksberg Analysis*

The Eleventh Circuit’s opinion in *Williams* strongly implies that on remand the district court should perform a *Glucksberg* analysis to determine whether the right claimed by the plaintiffs is indeed fundamental.⁹⁷ The statute at issue in *Glucksberg* made it illegal to assist or cause a suicide.⁹⁸ Plaintiffs, who filed for declaratory judgment that the statute violated the Due Process Clause, included terminally ill patients and physicians who stated that if it were not for the statute, they would assist some of their terminally patients in committing suicide.⁹⁹ The Court began by looking at United States

92. *Id.* at 97.

93. *Id.* (emphasis added).

94. *Id.* at 99.

95. Some might argue that a more appropriate test would be the undue burden analysis used in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Stenberg v. Carhart*, 530 U.S. 914 (2000). Under the undue burden test, a court would look to see whether the obscenity statutes had the “purpose or effect [of placing] a substantial obstacle[] in the path of a” person seeking to buy a sexual device. *Casey*, 505 U.S. at 837. However, the undue burden test should not apply in cases related to sexual devices. *Casey* and *Stenberg* dealt with abortion issues, which affect more people than just the individual making the decision to end her pregnancy. Buying and selling sexual devices, however, does not have the same type of ramifications, particularly not the ending of a life-in-progress, as some people believe abortion does. There is no real comparison to be made here.

96. 521 U.S. 702, 722-23 (1997).

97. *Williams*, 240 F.3d at 955-56.

98. *Glucksberg*, 521 U.S. at 705-06.

99. *Id.* at 707-08.

history and legal traditions and practices.¹⁰⁰ It pointed out that assisted suicide had been against the common morality since the founding of the United States, as well as having been a crime at common law before that.¹⁰¹ The Court then looked at the plaintiffs' due process claims.¹⁰² In doing so, it followed a two-step analysis, looking first at whether there was a liberty interest at stake,¹⁰³ then at whether such a liberty interest was part of the United States' tradition.¹⁰⁴

The first step in the due process analysis involves determining whether there was a liberty interest at stake.¹⁰⁵ In *Glucksberg*, the Court followed its tradition of "carefully formulating the interest at stake in substantive-due-process cases."¹⁰⁶ It crafted the question as "whether the 'liberty' specially protected by the Due Process Clause include[d] a right to commit suicide which itself includes a right to assistance in doing so."¹⁰⁷

In *Williams*, the Eleventh Circuit seemed to believe that in order to determine whether there was a liberty interest, they needed to establish whether "our nation ha[d] a deeply rooted history of state interference, or state non-interference, in the private sexual activity of married or unmarried persons."¹⁰⁸ In this Note's analysis, however, the question is whether the decision to buy and use sexual devices is one that can fundamentally affect an individual's life.

The second step of the *Glucksberg* analysis was to determine whether the "asserted right ha[d] any place in our Nation's traditions."¹⁰⁹ This can also be phrased as "whether contemporary practice bolsters or undermines" the historical aspects of the right.¹¹⁰ The Court noted that in order to strike down Washington's statute banning assisted suicide, it would have to "reverse centuries of legal doctrine and practice, and strike down the considered policy choice of

100. *Id.* at 710.

101. *Id.* at 711-16.

102. *Id.* at 719.

103. *Id.* at 722.

104. *Glucksberg*, 521 U.S. at 723.

105. *Id.* at 722.

106. *Id.* at 722.

107. *Id.* at 723.

108. *Williams*, 240 F.3d at 956.

109. *Glucksberg*, 521 U.S. at 723.

110. *Williams*, 240 F.3d at 955.

almost every State.”¹¹¹ After distinguishing two other Supreme Court cases,¹¹² the Court affirmed the constitutionality of the assisted-suicide statute.¹¹³ As discussed previously in this Note, a similarly historical approach was taken by the Supreme Court in *Bowers*.¹¹⁴

a. Applying *Glucksberg* to the Sale and Purchase of Sexual Devices

A look at the history of statutes banning the sale of sexual devices does not show the same type of continuous proscription that the Court saw in *Glucksberg* and *Bowers*. Only a handful of states have obscenity statutes that include bans on the sales of sexual devices,¹¹⁵ and three other states struck down their statutes as being unconstitutional.¹¹⁶ Furthermore, most of these anti-sexual device statutes have not been in place for very long, as opposed to the “centuries” of history relied on by the Court in *Glucksberg*¹¹⁷ and the “ancient roots” relied on in *Bowers*.¹¹⁸ Clearly the compelling historical argument in *Glucksberg* played a large part in the Court’s decision. Conversely, the lack of a historical argument regarding the sale of sexual devices should work in favor of declaring anti-sexual device statutes unconstitutional under a *Glucksberg* analysis. Furthermore, the use of sexual devices in therapy can save marriages and other intimate relationships and thus can have an enormous and fundamental impact on an individual’s life.

Therefore, considering a *Glucksberg* analysis, along with both the Colorado and Kansas cases discussed below, the decision to buy and use sexual devices is one that fundamentally affects an individual’s life and thus falls under the constitutional privacy right.

B. Ends/Mean Test

As noted by the court in *Williams*, states traditionally have had a compelling interest in protecting the morals of their citizens.¹¹⁹ This

111. *Glucksberg*, 521 U.S. at 723.

112. *Id.* at 724-28.

113. *Id.* at 728.

114. *See supra* note 79.

115. ALA. CODE § 13A-12-200.2; GA. CODE ANN. § 16-12-80(a); MISS. CODE ANN. § 97-29-105; TEX. PENAL CODE ANN. § 43.23; VA. CODE ANN. § 18.2-372.

116. *People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 370 (Colo. 1985); *State v. Hughes*, 792 P.2d 1023 (Kan. 1990); *State v. Brenan*, 739 So. 2d 368 (La. Ct. App. 1999).

117. *Glucksberg*, 521 U.S. at 723.

118. *Bowers*, 478 U.S. at 192.

119. *Williams*, 240 F.3d at 949.

interest includes protecting children and unconsenting adults from being exposed to sexually explicit materials. However, banning the sale of sexual devices outright is certainly not the most narrowly tailored method of reaching the desired goal. As discussed in Section IV.A.3. *infra*, there are ways that legislatures can regulate the sale of sexual devices that are more narrowly tailored to serve the compelling state interest, such as requiring visual barriers or forbidding minors to enter stores selling sexual devices. Therefore, current anti-sexual device statutes fail the ends/means test of strict scrutiny and should be struck down.

C. State Court Decisions Based on Strict Scrutiny

Colorado, Kansas, and Texas had statutes that criminalized the sale of sexual devices. These statutes were overturned by the supreme courts of Colorado and Kansas on the basis that their citizens' fundamental privacy rights were being impinged (i.e. using the strict scrutiny test). The Texas Supreme Court upheld the Texas statute, but the case can be distinguished from others, particularly *Williams*, and should not be followed. Cases challenging anti-sexual device statutes, including *Williams* on remand or if it is appealed to the Supreme Court, should reach similar decisions to those of the Colorado and Kansas supreme courts.

1. Colorado

Colorado had an obscenity statute that made it a crime to "promote[] . . . any obscene device."¹²⁰ "Obscene devices" were defined as "device[s] including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs."¹²¹ The portion of the obscenity statute relating to obscene devices was severed and struck down in 1985.¹²²

In *People v. Seven Thirty-Five East Colfax, Inc.*, three cases challenging Colorado's obscenity statute were consolidated due to the similarity of their claims.¹²³ In the first case, *People v. Seven Thirty-Five East Colfax, Inc.*, the prosecution in a civil suit wanted to have certain items labeled obscene.¹²⁴ The trial court found an unrelated section of the statute unconstitutional, but denied dismissal of the

120. COLO. REV. STAT. § 18-7-102(2)(a)(I) (1984).

121. *Id.* at § 18-7-101(3).

122. *Seven Thirty-Five E. Colfax*, 697 P.2d at 370, 372.

123. *Id.* at 353.

124. *Id.*

complaint.¹²⁵ In the second case, *People v. Mizell*, defendants had been charged with selling obscene devices in violation of the statute.¹²⁶ The trial court held the entire statute invalid, but stayed judgment pending appeal.¹²⁷ Finally, in *Adult Literary Guild v. Beacom*, plaintiffs wanted an injunction against enforcement of the statute. The trial court held that the statute was unconstitutional and granted the injunction.¹²⁸ On the consolidated appeal, the Colorado Supreme Court struck down the part of the statute referring to obscene devices.¹²⁹

The supreme court believed that Colorado's obscenity statute impermissibly burdened the privacy right, stemming from the liberty interest based in the Due Process Clause.¹³⁰ It referred to the privacy rights of those who want to use sexual devices as part of "legitimate medical or therapeutic" treatment.¹³¹ It further noted the state's lack of a compelling interest justifying such a broad and sweeping proscription of sexual devices.¹³² The supreme court also explicitly declined to answer the question of whether the sale and use of sexual devices could be regulated by the state.¹³³

2. *Kansas*

A Kansas obscenity statute dealing with the sale of obscene devices was struck down by the Kansas Supreme Court in 1990.¹³⁴ The Kansas statute made it illegal to "sell[] . . . any . . . obscene device."¹³⁵ "Obscene device" was defined as "a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs."¹³⁶

The state charged Randy Hughes with selling two obscene devices¹³⁷ to undercover police officers.¹³⁸ During his evidentiary

125. *Id.* at 354.

126. *Id.*

127. *Id.*

128. *Seven Thirty-Five E. Colfax*, 697 P.2d at 354.

129. *Id.* at 370.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 370, n.28.

134. *Hughes*, 792 P.2d at 1032.

135. KAN. STAT. ANN. § 21-4301(a)(1) (1989).

136. *Id.* at § 21-4301(c)(3).

137. These devices were "The Sexplorer Pleasure System," consisting of a vibrator with dildo attachment, and "Miss World," an "inflatable doll with an artificial vagina."

hearing, a doctor testified, as in *Williams*, to the effectiveness of dildo-type vibrators in treating anorgasmic women.¹³⁹ He provided the same three reasons for effectiveness that were given by the experts in *Williams*.¹⁴⁰ The trial court's rationale was that the statute was overbroad because it invaded the privacy right, and thus the right to perform or receive legitimate medical treatment, because physicians and therapists could be subject to criminal sanctions.¹⁴¹

The Kansas Supreme Court chose to follow the Colorado Supreme Court's decision in *Seven Thirty-Five East Colfax*.¹⁴² It declared not only that "the dissemination and promotion of such devices for purposes of medical and psychological therapy" were constitutionally protected activities, but that the statute was overbroad because it violated the privacy right as it related to such therapy.¹⁴³ The court concluded that the state legislature had not demonstrated an interest compelling enough to justify infringing such rights. The amended Kansas statute now specifically excludes devices that were "disseminated or promoted for the purpose of medical or psychological therapy."¹⁴⁴

3. Texas

In a more recent Texas case, a trial court convicted Noe Regalado of possessing obscene devices with the intent to sell, and his sentence was affirmed by the Texas Court of Appeals.¹⁴⁵ Undercover police officers discovered devices that they believed were obscene¹⁴⁶ at the shop where Regalado was working.¹⁴⁷ The officers seized the devices and arrested Regalado.¹⁴⁸ The appellate court upheld the Texas statute, declaring that it was following *Yorko v. State*,¹⁴⁹ and did

Hughes, 792 P.2d at 1025.

138. *Id.*

139. *Id.*

140. *Id.* at 1026; *Williams*, 41 F. Supp. 2d at 1257, 1274-75.

141. *Hughes*, 792 P.2d at 1026.

142. 697 P.2d 348 (Colo. 1985).

143. *Id.* at 1032.

144. KAN. STAT. ANN. § 21-4301(c)(3).

145. *Regalado v. State*, 872 S.W.2d 7, 8 (Tex. 1994).

146. Namely, an item called the Flexi-lover. *Id.*

147. *Id.*

148. *Id.* The Texas statute includes a presumption that when there are "six or more obscene devices" in a person's possession, that person has an intent to sell them. TEX. PENAL CODE ANN. § 43.23(f).

149. 690 S.W.2d 260 (Tex. 1975). See discussion *infra* Part IV.A.2.

not believe there was a privacy right that "protects use of or possession with intent to promote obscene devices."¹⁵⁰ *Regalado* thus has a major characteristic distinguishing it from *Williams*: the defendant in *Regalado* was not allowed to bring up the health benefits of sexual devices because of his position as a retailer, as opposed to purchaser.¹⁵¹

Furthermore, the court in *Regalado* considered whether "the right to privacy protects the use of or possession with intent to promote obscene devices," not whether there is a more general fundamental privacy right involved.¹⁵² It went on to note the Supreme Court's opinion in *Carey*,¹⁵³ which pointed out that the Court had "never held that a fundamental right to sexual privacy exist[ed] under the constitution."¹⁵⁴ What the *Regalado* court failed to mention was the footnote in *Carey* which stated that the Court had never "definitively answered the difficult question whether and to what extent" our constitution prohibits statutes that regulate "private consensual sexual behavior" among adults.¹⁵⁵ *Carey* discussed whether the sexual mores of minors could be regulated, not whether the right to privacy should be expanded or contracted.¹⁵⁶ Therefore, the holding in *Regalado* should not apply to anti-sexual device cases in general.

IV. Rational Basis

Even if courts decide that anti-sexual device statutes are not protected by the privacy right, and thus do not meet the criteria for the strict scrutiny test, such statutes should be struck down under the rational basis test. When there is no interference with a fundamental right, courts use this very deferential test to determine the constitutionality of statutes.¹⁵⁷ The test is so highly deferential to the legislature that it has been described as "minimum scrutiny in theory and virtually none in fact."¹⁵⁸ Indeed, almost all statutes analyzed

150. *Regalado*, 872 S.W.2d at 9.

151. *Id.*

152. *Id.* at 4.

153. 431 U.S. 678 (1977).

154. *Id.*

155. *Carey*, 431 U.S. at 695 n.17.

156. *Id.*

157. Welch, *supra* note 60, at 73.

158. *Id.*

under the rational basis test are upheld by the courts.¹⁵⁹ All that is required for a statute to meet the rational basis test is that it be “rationally related to a legitimate state interest.”¹⁶⁰

However, some courts are still willing to use the rational basis test to strike down statutes being challenged under the Due Process Clause.¹⁶¹ One way of doing so is to find that a state has a legitimate interest in regulating a behavior or activity, but that the statute regulating that interest is overbroad.¹⁶² This should be the outcome in cases involving anti-sexual device statutes.

A. State Anti-Sexual Device Cases Decided Under the Rational Basis Test

When courts do not find a fundamental privacy right under Due Process analysis like the courts in Colorado, Kansas, and Texas, they use the rational basis test to determine whether there was a legitimate state interest that was rationally served by the statute. Several state cases deal with this issue. Georgia, Texas, and Louisiana had statutes criminalizing the sale of sexual devices. Courts in Georgia and Texas upheld their statutes, but the cases involved are readily distinguishable from cases such as *Williams*. Louisiana, in a case distinctly parallel to *Williams*, struck down its anti-sexual device statute under the rational basis test, finding that the state legislature could have used other means of reaching its goals.

1. Georgia

Georgia’s obscenity statute makes it illegal to “sell[] . . . any obscene material of any description”¹⁶³ “Obscene material” includes “[a]ny device designed or marketed as useful primarily for the stimulation of human genital organs.”¹⁶⁴ In *Sewell v. State*, the appellant was arrested and convicted after he sold an artificial vagina to a police officer.¹⁶⁵ The Georgia Supreme Court dismissed in one

159. *Id.* at 72-73.

160. *Cleburne*, 473 U.S. at 440.

161. *Welch*, *supra* note 60, at 73; *see also* *Romer v. Evans*, 517 U.S. 620 (1996).

162. *Hughes*, 792 P.2d at 1030.

163. GA. CODE ANN. § 16-12-80(a). It is an affirmative defense under the statute that “dissemination of the material was restricted to: [a] person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.” *Id.* at § 16-12-80(e)(2).

164. *Id.* at § 16-12-80(c).

165. 233 S.E.2d 187, 188 (Ga. 1977).

paragraph an attack on the statute's constitutionality.¹⁶⁶ It said merely that the statute had "withstood the same attacks" in the past.¹⁶⁷ Since the amendment in question had only more concretely defined terms that had been in the former statute, there was no substantive change.¹⁶⁸

The Georgia court was referring to *Dyke v. State*.¹⁶⁹ That case dealt with the screening of pornographic films that were declared obscene and did not include anything about sexual devices.¹⁷⁰ The appellant claimed that the statute was overbroad but the Georgia Supreme Court upheld the statute by stating that the claim must fail because Georgia's obscenity statute had been upheld by the United States Supreme Court in *Paris Adult Theatre I*.¹⁷¹

Paris Adult Theatre I was another case where pornographic films that were screened in adult theatres were declared obscene.¹⁷² This case can be distinguished from *Williams* and other constitutional challenges to anti-sexual device statutes by the fact that the complaint brought against the defendants was a civil claim for an injunction, not a criminal prosecution under an obscenity statute.¹⁷³ Therefore, the constitutionality of the Georgia obscenity statute was not at issue.¹⁷⁴

Furthermore, while it specifically mentioned items such as books and films, the Court did not mention sexual devices and the holding does not appear to apply to sexual devices at all. The opinion only discusses the limited question of whether there is a right "to watch obscene movies in places of public accommodation."¹⁷⁵ The one link to *Williams* is that the majority opinion specifically talks about the privacy right as encompassing and protecting "the personal intimacies of the home," including marriage.¹⁷⁶ As stated previously, the lack of sexual intimacy that may result from sexual dysfunction can destroy intimate relationships. Those relationships may be saved by the

166. *Id.*

167. *Id.*

168. *Id.*

169. 209 S.E.2d 166 (Ga. 1974).

170. *Id.* at 168.

171. *Id.* at 169. Also, the United States Supreme Court denied certiorari to *Paris Adult Theatre I* less than two weeks after arguments in *Dyke*. *Id.*

172. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 50 (1973).

173. *Id.* at 75 (Brennan, J., dissenting).

174. *Id.* at 77 (Brennan, J., dissenting).

175. *Id.* at 66.

176. *Id.* at 65.

therapeutic use of sexual devices.

2. *Texas*

As noted previously, the Texas obscenity statute makes it a felony to sell obscene devices.¹⁷⁷ An “obscene device” is defined in Texas as “a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.”¹⁷⁸ One appellate court upheld the Texas statute under the rational basis test.¹⁷⁹

In 1985, the Texas Court of Criminal Appeals upheld the obscenity statute in *Yorko v. State*.¹⁸⁰ Kenneth Yorko pled not guilty to possession with intent to sell a dildo.¹⁸¹ Yorko claimed on appeal that the statute violated the privacy right and was thus unconstitutional.¹⁸² He did not bring up, and the court did not discuss, arguments based on overbreadth or the health benefits of sexual devices.¹⁸³ The court believed that the very narrow question to be answered was whether “the due process clause of the Fourteenth Amendment guarantee[s] a citizen the right to stimulate his, her or another’s genitals with an object designed or marketed as useful primarily for that purpose.”¹⁸⁴ In other words, the court basically looked at whether there was a fundamental right to use sexual devices to stimulate human genitals,¹⁸⁵ the same basic question that the district court in *Williams* used, which the Eleventh Circuit believed was erroneous. Using this approach, the court held that the state was justified in making the sale of sexual devices a crime.¹⁸⁶

The dissent in *Yorko* also took notice of the question as the

177. See TEX. PENAL CODE ANN. § 43.23(a).

178. *Id.* at § 43.21(a)(7). As in Georgia, the Texas statute does allow for the affirmative defense of promoting obscene devices when it is for “a bona fide medical [or] psychiatric . . . purpose.” *Id.* at § 43.23(g). Interestingly, the appellant’s argument in *Regalado* involved a challenge based on the benefits of using sexual devices in medical or psychological treatment, but that argument was not followed in the holding. Perhaps the state legislature chose to include this subsection in order to keep the entire statute from eventually being struck down under the health and privacy rationale.

179. *Regalado v. State*, 872 S.W.2d 7 (Tex. 1994); *Yorko v. State*, 690 S.W.2d 260 (Tex. 1985).

180. *Yorko*, 690 S.W.2d at 265-66.

181. *Id.* at 261.

182. *Id.*

183. *Id.* at 261, 265.

184. *Id.* at 263.

185. *Id.* at 263.

186. *Yorko*, 690 S.W.2d at 266.

majority framed it, stating that the question could more properly have been framed as “[w]hether the constitutional right of personal privacy is broad enough to encompass a person’s decision to engage in private consensual sexual activity that includes stimulating human genital organs with an object designed to be primarily useful for that purpose.”¹⁸⁷ Judge Clinton went on to say that if the answer to that question was yes, then the line of contraception cases comes into play.¹⁸⁸ He quoted the United States Supreme Court, saying that “in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect”¹⁸⁹ The same can be said for statutes that make the sale of sexual devices illegal. They too, are more easily enforced, and certainly have a deleterious impact on those who are trying to purchase the items.

Judge Clinton further noted in his dissent that the privacy right means that people are “free from unwarranted governmental intrusion into matters” fundamentally affecting them, such as the decision whether to bear a child.¹⁹⁰ From that, it flows that the “decision whether to engage in private consensual sexual activity in the first instances must be practically invulnerable.”¹⁹¹ Particularly for people who require the use of sexual devices to engage in fulfilling sexual activity, statutes banning the sale of such items impinge on their fundamental right to privacy. A separate dissent also discussed the link to the contraceptive cases, stating that if a state may not deny access to contraceptives, it should not be able to deny access to sexual devices that have therapeutic value.¹⁹² That dissent went on to discuss the testimony of an expert in sexual behavior who believed that sexual devices, whether prescribed by a therapist or self-prescribed, are effective treatment, and the ability to purchase them should not be limited.¹⁹³

Besides the issues raised by the dissents in *Yorko*, the case can be distinguished from *Williams* in two very important ways. First, *Yorko* did not base his challenge on an overbreadth argument, so that

187. *Id.* at 267 (Clinton, J., dissenting)(emphasis excluded).

188. *Id.* (Clinton, J., dissenting).

189. *Id.* at 267 n.4 (Clinton, J., dissenting) (citing *Carey*, 431 U.S. 684).

190. *Id.* at 268 (Clinton, J., dissenting).

191. *Id.* at 268 (Clinton, J., dissenting).

192. *Yorko*, 690 S.W.2d at 272 (Teague, J., dissenting).

193. *Id.* at 273 (Teague, J., dissenting).

challenge was not considered by the court.¹⁹⁴ Second, the court did not consider the health benefits of sexual devices, except in a single brief sentence in a dissent.¹⁹⁵ Yorko merely brought up the idea that sexual devices were “designed, purchased and used consensually only for the purpose of sexual stimulation and gratification.”¹⁹⁶ Therefore, the court’s rationale in *Yorko* cannot be extended to all cases regarding the sale of sexual devices, particularly those where the devices are intended for use in sexual therapy.

3. *Louisiana*

The most compelling case, and the one most similar to *Williams*, is *State v. Brennan*, from the Louisiana courts.¹⁹⁷ Louisiana’s statute criminalizing sexual devices stated that “[n]o person shall knowingly and intentionally promote an obscene device.”¹⁹⁸ “Obscene device” was defined to include “an artificial penis or artificial vagina” . . . [intended for] the stimulation of human genital organs.”¹⁹⁹ In 1999, this statute was declared overbroad and thus unconstitutional by the Louisiana Court of Appeal.²⁰⁰

The state charged Christine Brennan with promoting obscene devices under the Louisiana statute and the trial court convicted her on both counts.²⁰¹ Brennan had sold the devices at her place of business, and undercover officers had purchased several devices that they deemed obscene. On appeal, she claimed that the trial court erred in denying her motion to have the statute declared unconstitutional. After noting the conflicting results of the cases from Georgia, Texas, Alabama, and Kansas, the trial court agreed with the rationale of the district court in *Williams*, holding that the statute lacked a “rational relationship to a legitimate state interest.”²⁰² As the district court did in *Williams*, the appellate court performed its analysis with the idea that the primary purpose of the statute was to protect children and unconsenting adults.²⁰³

194. *Id.* at 262.

195. *Id.* at 272 (Teague, J., dissenting).

196. *Id.* at 265.

197. 739 So. 2d 368 (La. 1999).

198. LA. REV. STAT. ANN. § 14:106.1(B) (West 1999).

199. *Id.* at § 14:106.1(A)(1).

200. *Brennan*, 739 So. 2d at 372.

201. *Id.* at 369.

202. *Id.* at 371.

203. *Id.* at 372.

The appellate court held that “the regulation of the sale of obscene devices [wa]s clearly within the scope of the State’s police power.”²⁰⁴ Another important factor was the legislature’s purpose that children should and could be protected from public displays of obscene devices.²⁰⁵ The court held that the state did have a legitimate interest in protecting children.²⁰⁶ However, the statute could have been much more narrowly drawn, and thus was overbroad in its application of the police power.²⁰⁷ As the court noted, only consenting adults will actually purchase such devices, and unconsenting adults would merely be upset or offended by such items.²⁰⁸

The district court in *Williams* also held that the state had a legitimate interest in protecting children and unconsenting adults, and still found no rational relation between Alabama’s statute and the legislature’s purposes.²⁰⁹ This is the type of outcome that we should see in cases involving anti-sexual device statutes. Statutes regulating sales of sexual devices need not ban them completely to achieve the purported legislative purpose. Stores selling sexual devices could easily put up curtains or some other kind of visual barrier so that children and unconsenting adults passing on the street would not be subjected to the displays.²¹⁰ Furthermore, storeowners could put up signs outside their stores, informing passersby that they could potentially be offended and that children are not permitted to enter. Finally, adults attending the Tupperware-style parties provided by some vendors of sexual devices²¹¹ most certainly consent to the exposure by being present. Statutes could ban the attendance of children at such parties, if that was a concern.

204. *Id.*

205. *Id.*

206. *Brenan*, 739 So. 2d at 372.

207. *Id.* The Louisiana legislature could, for instance, regulate promotion or advertising of obscene devices, or require licensing of vendors. *Id.*

208. *Id.*

209. *Williams*, 41 F. Supp. 2d at 1287.

210. Some stores selling sexual devices, including Good Vibrations in San Francisco, already use visual barriers, both to protect children walking past the store and to protect the privacy of their customers.

211. Such as those thrown by Saucy Lady, Inc., one of the plaintiffs in *Williams v. Pryor*.

V. Conclusion

Statutes banning the sale of sexual devices are, in the words of Justice Stewart, just plain “silly.”²¹² Justice Stewart went on to say that it was not the Court’s job to determine whether it thought the “law [wa]s unwise, or even asinine.”²¹³ While it might not be up to the judiciary to determine the inherent ridiculousness of laws, it *is* its place to ensure that American citizens do not have their rights trampled upon by legislators overeager to inflict their views of appropriate sexuality upon the general populace.

The decision to use a sexual device, regardless of the reason, is an intimate, individual decision and not one that should be impinged upon by state legislatures and the courts. Not only does the constitutional right of privacy include the right to buy sexual devices for use in the privacy of one’s home, but these devices are used by many people for many purposes, and have a legitimate therapeutic value. They do not harm those who choose not to buy or use them. In fact, states can regulate how they are sold and advertised without infringing the fundamental right to make the individual decision whether to purchase and use sexual devices.

Furthermore, our society has changed over the past several decades. Our widely held belief that people deserve happiness in marital relationships has been supplemented by the idea that other intimate relationships are acceptable. Sexual fulfillment is an integral part of happiness in intimate relationships. Statutes criminalizing the sale of sexual devices are deleterious to this concept and to the privacy right as a whole. They must be struck down.

212. *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting).

213. *Id.*

